

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	WC Docket No. 06-122
Request for Review of Decision of the)	
Universal Service Administrator by)	
IDT Corporation and IDT Telecom, Inc.)	

**REPLY COMMENTS BY IDT CORPORATION AND IDT TELECOM, INC.
IN SUPPORT OF REQUEST FOR REVIEW OF DECISION
BY THE UNIVERSAL SERVICE ADMINISTRATOR**

IDT Corporation and IDT Telecom, Inc. (collectively, "IDT"), by the undersigned counsel, respectfully submit these Reply Comments in response to the September 5, 2008 Comments filed by Network Enhanced Telecom, LLP dba NetworkIP ("NetworkIP") and AT&T Inc. ("AT&T"),¹ and in further support of its June 30, 2008 Request for Review of audit decisions made by the Universal Service Administrative Company ("USAC") on April 30, 2008² in the above-captioned case.³

I. INTRODUCTION

The USAC Audit Report contained six separate findings, each of which addressed a specific IDT product, service, or line item from IDT's Form 499-A for filing years 2006 and 2007. IDT's Request for Review is confined to two aspects of the USAC Audit Report involving IDT's reporting of telecommunications revenues for purposes of the companies' Universal Service Fund ("USF") contributions. Specifically, IDT appealed USAC's recommendations

¹ See Comments of Network Enhanced Telecom, LLP dba NetworkIP, WC Docket No. 06-122 (filed September 5, 2008); Comments of AT&T Inc., CC Docket No. 96-45 (filed September 5, 2008).

² USAC Audit Report No. CR2007CP004 (April 30, 2008) ("USAC Audit Report").

³ IDT incorporates its Request for Review as if fully set forth herein.

regarding IDT's reporting of (1) prepaid calling card revenue;⁴ and (2) reseller, or carrier's carrier, revenue.⁵ USAC erroneously attempted to reclassify both categories of revenue as end user revenue.

As IDT demonstrated in its Request for Review, neither product category constitutes end user revenue subject to USF contributions under the Commission's applicable regulations and orders (hereafter, "Applicable Law"). To the extent that the Form 499-A instructions regarding calculation of end user telecommunications revenue are contrary to Applicable Law, they are invalid and unenforceable. The invalidity of the instructions is plain, as they were issued subsequent to adoption of the regulations and constitute a substantive change without opportunity for notice and comment mandated by the Administrative Procedure Act ("APA").⁶ Moreover, even if the instructions were not subject to the APA's notice and comment requirements, they conflict with the Commission's USF regulations that require USF contribution on end user telecommunications revenues. As a result, the instructions are invalid and may not be used to alter IDT's USF obligations.

NetworkIP supports IDT's position. AT&T suggests that the Commission deny IDT's Request for Review if it finds that IDT lacked a reasonable basis to conclude that IDT's prepaid calling card customers were contributing to the USF mechanisms.⁷ Because IDT has a reasonable basis for its position and its position is consistent with Applicable Law, the Commission should grant IDT's appeal.

⁴ See USAC Audit Report, Finding Number 1 at 7-8.

⁵ See USAC Audit Report, Finding Number 2 at 13-15.

⁶ 5 U.S.C. § 551, et seq.

⁷ AT&T Comments at 1.

II. IDT'S REPORTING IS CONSISTENT WITH APPLICABLE LAW

As explained herein and in its prior filing, IDT's USF reporting complies with Applicable Law. AT&T bases its argument against IDT's appeal on the Form 499-A instructions, even though AT&T admits that the instructions suffer from procedural infirmities. As shown herein, IDT's method of reporting revenues has a reasonable basis in Applicable Law and the Commission should grant IDT's appeal.

The Commission's USF revenue reporting requirements obligate interstate telecommunications carriers to report their telecommunications revenues under two broad categories, which include "carrier's carrier" revenue and "end user revenue."⁸ This is consistent with the Commission's *First Report and Order*, in which the Commission adopted regulations regarding the assessment of, and contribution to, the USF.⁹ In ruling that a carrier's USF contribution shall be assessed on end user telecommunications revenues only, the Commission concluded that:

[USF] contributions will be based on revenues derived from end users for telecommunications and telecommunications service, or "retail revenues"...End user revenues would also include revenues derived from other carriers when such carriers utilize telecommunications services for their own internal uses because such carriers would be end users for those services. This methodology is both competitively neutral and relatively easy to administer.¹⁰

Similarly, the Commission's USF regulations provide that "every telecommunications carrier that provides interstate telecommunications services...shall contribute" to USF on the basis of its "interstate and international *end user* telecommunications revenues."¹¹ As IDT

⁸ Request for Review at 3.

⁹ See *In re Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) ("First Report and Order").

¹⁰ *Id.* at ¶ 844 (emphasis added).

¹¹ 47 C.F.R. § 54.706(a) (emphasis added).

demonstrated in its Request for Review, neither the USF regulations nor underlying orders define the term “end user,” which should be afforded its ordinary and customary meaning.¹²

IDT’s position that the disputed revenue categories involve wholesale revenue, which is not subject to USF contribution, in lieu of end user revenue, which is subject to contribution, is set forth in the companies’ Request for Review.¹³ Under Applicable Law, sales of prepaid calling cards should be treated as “end user” sales only when they are truly sales directly to “end users” by the carrier, under the ordinary and customary meaning. Because IDT’s sales are to distributors and/or retail sales outlets rather than to end users, the revenues are not end user revenues subject to USF contribution.¹⁴

IDT’s dispute with USAC is based on language contained in Form 499-A instructions that was added after the FCC adopted its USF contribution policy. In marked contrast to Applicable Law, the Form 499-A instructions define as end user revenue “card sales to customers and non-carrier distributors.”¹⁵ The instructions for this line provide that such end user revenue includes “revenues from pre-paid calling cards provided either to customers or to retail establishments” and that “[a]ll prepaid card revenues are classified as end user revenues.”¹⁶ IDT’s Request for Review concerns the obvious discrepancy between Applicable Law and the Form 499-A’s unilateral modification of the definition of end user revenue. The Form 499-A instructions not only conflict with the Commission’s USF regulations, but violate the APA by

¹² See Request for Review at 5-6.

¹³ Request for Review at 4-6.

¹⁴ See Request for Review at 14. See Network IP Comments at 4 (there is no question that the form instructions, by requiring prepaid card providers to contribute based on wholesale revenues, are inconsistent with the Commission’s end-user revenue methodology for universal service contributions).

¹⁵ 2008 Form 499-A at Line 411. See also 2007 FCC Form 499-A at Line 411.

¹⁶ 2000 FCC Form, Instructions at 17. See also 2007 Form 499-A, Instructions at 27.

amounting to a substantive rule that was not promulgated with proper notice and comment.¹⁷ Because the Form 499-A language is not legally effective, USAC erred in attempting to make IDT responsible for USF contributions based on amounts that are properly characterized as wholesale revenue rather than as end user revenue.¹⁸

Against this unambiguous legal framework, AT&T now asserts that IDT's Request for Review should be denied if the Commission finds that IDT had no reasonable basis to conclude that the entities to which IDT sold its prepaid calling cards were contributing to the USF mechanisms.¹⁹ AT&T reasons that IDT has such an obligation based on the language of Form 499-A.²⁰ This conclusion is curious, given that AT&T represents that it has similarly disputed unilateral modifications to the USF contribution mechanism through Form 499-A instruction changes, and has urged the Commission to seek comment on the prepaid calling card language.²¹

The "reasonable expectation" standard AT&T relies on suffers from the same conflict with Applicable Law and lack of APA notice and comment. The Commission did not define "carrier's carrier" revenue based on a reasonable expectation standard. That standard was included in the Form 499-A instructions without notice or comment. Nor did the Commission

¹⁷ Request for Review at 11. IDT also takes the position that, even if the instructions are deemed to be merely "interpretative" and not subject to notice and comment procedures, they are nonetheless invalid because they conflict with the Commission's regulations specifying that USF contributions are assessed on the basis of end user revenues. *Id.* at 11-14. See Network IP Comments at 2 (the current instructions for reporting prepaid card revenues are invalid and cannot be enforced against IDT or any other entity).

¹⁸ See Network IP Comments at 10 ("The Commission cannot adopt an end-user contribution methodology in its rules and orders, and then release form instructions that apply a totally different contribution methodology to prepaid card revenues").

¹⁹ AT&T Comments at 1.

²⁰ AT&T Comments at 5.

²¹ AT&T Comments at 4-6.

define “end user” revenue based on the absence of a reasonable expectation that the customer would contribute directly to USF.²² In sum, because the “reasonable expectation” standard conflicts with Applicable Law, the FCC cannot rely on this standard to deny IDT’s Request for Review.²³

III. THE COMMISSION CANNOT AND SHOULD NOT INTERPRET APPLICABLE LAW BASED ON THE FACT THAT NOT ALL PARTIES UNDERSTOOD OR FOLLOWED APPLICABLE LAW

AT&T claims that IDT would reap a competitive advantage if it were permitted to exclude prepaid calling card revenue from its USF revenue base because AT&T has included such revenues in its contribution base.²⁴ AT&T is wrong. Any competitive disadvantage that has resulted from differing interpretations of Applicable Law does not justify “leveling the playing field” by making all parties follow AT&T’s interpretation of the law. The Applicable Law can be unclear or impractical to implement, as Network IP noted in its comments.²⁵ Companies’ interpretation of the Applicable Law may differ if the Commission has not offered a more detailed clarification through a notice and comment proceeding. Even AT&T has, in the past, interpreted FCC precedent in a manner that reduced its USF payments on calling card revenue.

IDT lawfully reports its revenues in compliance with the FCC’s orders and regulations, rather than in accordance with the contradictory and invalid Form 499-A instructions. AT&T’s

²² See Request for Review at 4-7, 12-14.

²³ AT&T notes that the “reasonable expectation” standard has existed since the inception of the original USF reporting worksheet. See AT&T Comments at 2, 6-7. However, AT&T neglects to mention that the original worksheet was not published for notice and comment, a point which IDT emphasizes in its Request for Review. Request for Review at 7-9.

²⁴ AT&T Comments at 8-9.

²⁵ Network IP Comments at 8.

alleged adherence to the invalid Form 499-A instructions does not render IDT's lawful actions improper in any way, and, despite its protestations, AT&T cannot be placed at a "significant competitive disadvantage" as a result of IDT's wholly proper revenue reporting, even if AT&T elects to report in a manner that is not required.²⁶ This alleged competitive disadvantage does not change what the law requires. If the Commission determines there is a competitive disadvantage, it can remedy that situation on a going forward basis as it did in the *Intercall Order*.²⁷

Finally, IDT strenuously objects to and denies AT&T's entirely unsupported allegation that IDT may have engaged in "inaccurate" or "likely fraudulent" conduct in connection with its revenue reporting.²⁸ IDT provides accurate certifications to its wholesale carriers. The Form 499-A instructions note that carriers certify that they provide the services being purchased as telecommunications and not as information, and that the carrier contributes based on its sales, when those sales are to end users.²⁹ As IDT does not believe that many of its sales are to end users, as that term is ordinarily defined, it does not need to contribute on those sales, nor is it required to certify that it is so paying. By contrast, AT&T has taken the position that its services were not telecommunications at all. In 2005, AT&T took the position that its IP-in-the-middle and menu-based prepaid calling cards were not subject to USF contribution under current law

²⁶ See AT&T Comments at 9.

²⁷ See in the Matter of Request for Review by InterCall, Inc. of Decision of Universal Service Administrator, Order, CC Docket No. 96-45 (rel. June 30, 2008) at ¶8 (Finding that USAC decision requiring audio bridging provider to report revenues and make USF contributions should be applied on going-forward basis rather than for past periods due to industry-wide lack of clarity regarding whether such providers had direct contribution obligation).

²⁸ AT&T Comments at 9.

²⁹ Form 499-A, Instructions at 19.

and presumably reported such services as enhanced services on the Form 499-A.³⁰ Rather than finding AT&T engaged in “inaccurate” or “likely fraudulent” conduct in connection with this revenue reporting, the FCC determined that AT&T should have reported the IP-in-the-middle revenue as telecommunications and directed AT&T to refile its Form 499-As.³¹ With respect to the menu-driven cards, the FCC directed all providers to report such revenue as telecommunications on a going forward basis.³² In short, although the Commission may ultimately accept or reject a party’s interpretation of USF contribution requirements, that does not make the party’s reporting inaccurate or fraudulent.

³⁰ See AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Order and Notice of Proposed Rulemaking, WC Docket Nos. 03-133, 05-68, 20 FCC Rcd 4826 (2005) at ¶9, n. 14 (noting that AT&T apparently stopped reporting enhanced prepaid card services revenues for purposes of calculating universal service contributions).


³¹ Id. at ¶31.

³² In the Matter of Regulation of Prepaid Calling Card Services, Declaratory Ruling Report and Order, WC Docket No. 05-68 (rel. June 30, 2006) at ¶¶ 21-22.

IV. CONCLUSION

IDT respectfully requests that the Commission grant IDT's June 30, 2008 Request for Review for the reasons set forth herein and in IDT's Request for Review.

Respectfully submitted,



Tamar E. Finn
Douglas D. Orvis II
Bingham McCutchen LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (Tel)
(202) 424-7647 (Fax)

Counsel for IDT Corporation and IDT Telecom, Inc.

Dated: September 22, 2008